UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7589

UNITED STATES OF AMERICA,

vs.

MAHESH C. BHARDWAJ,
Appellant

Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Criminal No. 1-Cr-93-172-02)
District Judge: Honorable Malcolm Muir

Submitted Under
Third Circuit LAR 34.1(a)
Tuesday, May 2, 1995

BEFORE: MANSMANN, SCIRICA, and SAROKIN, Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to wit:

I. The defendant was entitled to a two-point reduction for acceptance of responsibility; and

II. The single theft was simple and did not involve more planning than typical of the usual offense of this type, and thus the district court erred in assessing a two-level enhancement for more than minimal planning;

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. With respect to defendant's claim of ineffective assistance of counsel on grounds that defense counsel should not have objected to the portion of the presentence report which noted the non-delivery of transducers, that claim is dismissed without prejudice and can be raised in a collateral proceeding.

By the Court,

Circuit Judge

ATTEST:

P. Douglas Sisk, Clerk

DATED: May 10, 1995

Certified as a true copy and issued in lieu of a formal mandate on June 1, 1995.
Teste:
Clerk, U.S. Court of Appeals for the Third Circuit

IN THE UNTIED STATES DISTRICT COURT,
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATE OF AMERICA:

: No. 4:
Cr-93-172-02
MAHESH C. BHARDWAJ :

OPINION

August 25, 1994

MUIR, District Judge.

I. Introduction

On July 22, 1993, a Grand Jury in the Middle District of Pennsylvania returned a six-count indictment against Defendants Mahesh Bhardwaj, Mini Bhardwaj, Charles Morris, and Ultran Laboratories, Inc. The indictment charged the Defendants with conspiracy to commit mail and wire fraud in violation of 18 U.S.C. Sec. 371 (Count I) and with five substantive counts of mail and wire fraud in violation of 18 U.S.C. Sec. 1341 (Counts II and through

VI). Morris subsequently entered a plea of guilty.

On October 14, 1993, the United States filed a superseding indictment against the Defendants Ultran Laboratories, Inc., Mahesh Bhardwaj, and Mini Bhardwaj. The superseding indictment includes a total of 10 counts. In Count I the Defendants are accused of being part of a conspiracy. Counts II through VII set forth six substantive counts of mail and wire fraud. The conspiracy involved overt acts resulting in receipt of a fraudulent $12,160.00 payment from the Timken Company ("Timken"). The defendants were also charged with conspiracy to obstruct justice (count VIII), money laundering (Count IX), and criminal forfeiture (Count X). The Defendants were re-arraigned on November

16, 1993, and entered pleas of not guilty.

Trial in the above-captioned case commenced on April 11, 1994. On that date Mahesh Bhardwaj pled guilty to Count I of the indictment. Mr. Bhardwaj admitted to conspiring with Morris to defraud Timken by submitting fraudulent invoices for ultrasonic transducers but has insisted that the four ultrasonic transducers were delivered to Timken. We ordered a presentence investigation and scheduled a presentence conference.

Mr. Bhardwaj filed objections to the presentence report. Mr. Bhardwaj contends that the probation officer erred in adding a 2-level increase for more than minimal planning and a 2-level increase for obstruction of justice. He also argues that he is entitled to a 2-level decrease for his acceptance of

responsibility which was denied to him by the probation officer.

On August 15, 1994, we held a hearing on Mr. Bhardwaj's objections. The following are the Court's findings of fact, discussion, and conclusions of law with regard to the issues raised.

II. Findings of Fact.

1. Ultran Laboratories, Inc. ("Ultran") is a Pennsylvania corporation engaged in the manufacture of ultrasonic transducers and associated research technology in State college, Pennsylvania. (Undisputed, hereafter "U")

2. The President and Founder of Ultran and a member of its Board of Directors was the Defendant Mahesh C. Bhardwaj. (U)

3. The Timken Company in Canton, Ohio manufactures primarily tapered

roller bearings and also special alloy steels. Transducers are traditionally used in the manufacture of these products. (U)

4. The Defendant Charles J. Morris was a Manager for the Timken Company ("Timken") at Timken's Research Center in Canton, Ohio. (U)

5. Charles J. Morris, in connection with his responsibilities for Timken, came into contact with Ultran, Mahesh Bhardwaj, and Mini Bhardwaj, Mahesh Bhardwaj's wife, regarding the development and purchase of transducers. (U)

6. On or about August of 1988, Mahesh Bhardwaj and Charles Morris agreed that Morris would direct Timken to issue a purchase order to Ultran for four ultrasonic transducers at a cost of $12,160, and that Ultran would not

manufacture or deliver the transducers but would nevertheless invoice Timken for the same.

7. In order to effectuate the scheme, Charles Morris agreed to create documentation at Timken to falsely reflect (sic) that the transducers had in fact been received. (U)

8. It was then agreed that, Charles Morris would authorize the $12,160 payment to Ultran. (U)

9. It was further agreed that, upon receipt of the $12,160 payment, Mahesh Bhardwaj and Ultran would pay Charles Morris $10,000 classifying it as consulting fees. (U)

10. It was further agreed that Ultran would keep the remaining $2,160. (U)

11. Mahesh Bhardwaj told Anil Goswami, an employee of Ultran, that

Charles Morris was in trouble and needed $10,000.

12. Mahesh Bhardwaj explained to Anil Goswami the scheme to defraud Timken.

13. Mahesh Bhardwaj told Anil Goswami that Morris would authorize Timken to pay Ultran notwithstanding the non-delivery of the transducers.

14. Mahesh Bhardwaj's plan was opposed by both Anil Goswami and Mini Bhardwaj who were overruled by Mahesh Bhardwaj and who directed them to put the plan into action.

15. On September 6, 1988, Charles Morris directed that a Timken purchase order be issued to the defendant Ultran for the delivery of four ultrasonic transducers. (U)

16. On September 22, 1988, Timken issued a purchase order to the Defendant

Ultran as directed by Charles Morris. (U)

17. On September 22, 1988, Charles Morris submitted a one page letter to Mahesh Bhardwaj and Ultran as false documentation of consulting fees allegedly earned during the period of July 1 through July 20, 1988 at a cost of $5,000. (U)

18. On October 1, 1988, Charles Morris submitted a second one page letter to Ultran as documentation for consulting fees allegedly earned during August of 1988 at a cost of $5,000. (U)

19. On October 19, 1988, Ultran submitted to Timken a fraudulent invoice in the amount of $12,160 for the four transducers. (U)

20. The four ultrasonic transducers ordered by Timken were never delivered to Timken by Ultran.

21. At least three of the four ultrasonic transducers for which Timken was billed to Timken never existed.

22. On December 2, 1988, Timken, in reliance upon the fraudulent invoice, issued a check payable to Ultran in the amount of $12,160. (U)

23. The $12,160 was subsequently deposited into Ultran's bank account in State College, Pennsylvania. (U)

24. On December 15 and December 19, 1988, Mini S. Bhardwaj issued two $5,000 checks drawn on Ultran's account payable to Charles Morris. (U)

25. The Defendant Mahesh Bhardwaj hand delivered the two $5,000 checks to Mr. Morris in Ohio on December 18, 1988. (U)

26. In May of 1991, a federal grand jury subpoena was served upon the Defendant Ultran directing that

documentation be produced reflecting the work performed by Morris on behalf of Ultran during his employment by Timken. (U)

27. Mini Bhardwaj discussed with Charles Morris the creation of reports to justify the $10,000 payment as a consulting fee.

28. Charles Morris complied and produced two fictitious reports purporting to be work performed by him in a consulting capacity for Ultran. (U)

29. Mahesh Bhardwaj wrote comments upon the two fictitious reports. (U)

30. The fictitious reports were submitted along with other documents to the grand jury in May of 1991. (U)

31. In September of 1992, then counsel for Defendants Mahesh Bhardwaj, Mini Bhardwaj and Ultran submitted

additional documentation purporting to reflect delivery of the transducers to Timken by Ultran. (U)

III. Discussion.

Mahesh Bhardwaj, hereafter Bhardwaj, pled guilty to conspiring to defraud Timken. The total offense level in the presentence report is 13. Bhardwaj contends that the total offense level should be 7.

Bhardwaj disputes the 2-level enhancement for more than minimal planning. U.S.S.G. Sec. 2F1.1(B)(2) states:

> If the Offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

The term "more than minimal planning" is defined by U.S.S.G. Sec. 1B1.1(f) as follows:

> "More than minimal planning" means more planning than is typical for

commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense. . .

"More than minimal planning" is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune . . .

In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accomplished by false entries.

Bhardwaj defrauded Timken by the payment of money to a Timken officer, the creation of false invoices at Ultran, the creation of false documentation at Timken, and fictitious reports for submission to federal investigators and the Grand Jury. There were repeated steps over an extended period of time to effect the fraud itself and thereafter there were

affirmative acts taken to conceal the fraud. These acts obviously constitute more than minimal planning under U.S.S.G. Sec. 2F1.1(b)(2). United States vs. Monaco, 23 F.3rd 793 (3d Cir. 1994).

Bhardwaj contests the 2-level increase for obstruction of justice. U.S.S.G. Sec. 3C1.1. Section 3C1.1 provides as follows:

> If the Defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

Bhardwaj delivered two fictitious consulting reports from Morris to the Grand Jury in response to the Grand Jury subpoena knowing them to be false. Bhardwaj by his own hand annotated the false consultant reports in the margins

to enhance the apparent authenticity of the reports. Bhardwaj's role in annotating and delivering the two fictitious reports to the Grand Jury in response to a Grand Jury subpoena constituted obstruction of justice under U.S.S.G. Sec. 3C1.1

We now turn to the question of acceptance of responsibility. U.S.S.G. Sec. 3E1.1(a) reads as follows:

> If the Defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

Application Note 1(a) of Sec.3E1.1 provides in pertinent part that "a defendant who falsely denies, or <u>frivolously contests</u>, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." (Emphasis added). Bhardwaj has not

clearly demonstrated acceptance of responsibility. Testimony by five witnesses indicates that delivery of the transducers did not occur. The testimony of the Ultran employee who allegedly delivered the transducers to Timken is at best ambivalent. The transducers were not delivered to Timken. Mahesh Bhardwaj's position to the contrary constitutes a "frivolous contest" of relevant conduct which disqualifies him for a 2-level decrease in his offense level under U.S.S.G. Sec. 3E1.1(a)for acceptance of responsibility.

IV. Conclusions of Law

1. The scheme to defraud Timken, involving the payment of money to a Timken officer, the creation of false invoices at Ultran, and the creation of false documentation at Timken constitute

more than minimal planning under U.S.S.G. Sec. 2F1.1(B)(2).

2. The creation of fictitious consulting reports for Grand Jury purposes together with fictitious handwritten annotations by Bhardwaj constitute more than minimal planning under U.S.S.G. Sec. 2F1.1(B)(2).

3. Mahesh Bhardwaj's role in delivering the two fictitious consulting reports to the Grand Jury in response to a Grand Jury subpoena constituted obstruction of justice under U.S.S.G. Sec. 3C1.1.

4. Mahesh Bhardwaj's assertion that Ultran transducers were delivered to Timken constitutes a frivolous contest of relevant conduct, thereby disqualifying him for a decrease in his offense level under U.S.S.G. Sec.

3E1.1(a) for acceptance of responsibility.

5. There are no factual errors in the presentence report.

6. There are no factual errors of law and no errors of calculation in the presentence report.

7. The base offense level is 6.

8. The total offense level is 13.

9. The Criminal history category is I.

10. The guideline imprisonment range is 12 to 18 months.

An appropriate order is entered.

Muir, U.S. District Judge